

NO. 46351-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SCHEEF  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey, Judge

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BRIEF OF APPELLANT

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## TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
Issues Presented on Appeal.....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
a. <u>Reckless Burning</u> .....	1
b. <u>Judicial Comments on Jury Instructions</u> .....	2
C. <u>ARGUMENT</u>	
1. TRIAL COURT'S HAND WRITTEN NOTES ON JURY INSTRUCTIONS CONSTITUTED PREJUDICIAL COMMENT ON THE EVIDENCE WHICH DENIED SCHEEF HIS RIGHT TO AN IMPARTIAL JURY TRIAL. ....	4
a. <u>Judicial Comment on Evidence May            Be Raised for the First Time on            Appeal</u> .....	4
b. <u>Judicial Comments Must Be            Analyzed as Per Se Prejudicial</u> .....	6
c. <u>Scheef Was Prejudiced By Judicial            Comments</u> .....	8
2. THE STATE FAILED TO PROVE BEYOND A REASONBLE DOUBT THE ELEMENT, "MATERIAL" IN THE CHARGE OF MAKING A FALSE STATEMENT TO A PUBLIC OFFICER..	9

## TABLE OF CONTENTS

	Page
a. <u>Overview Burden of Proof</u> .....	9
b. <u>RCW 9A.76.175 Making False Statement to Public Servant</u> .....	10
c. <u>The False Statement Was Not Material</u> .....	11
D. <u>CONCLUSION</u> .....	13

## TABLE OF AUTHORITIES

### Page

### WASHINGTON CASES

<i>State v. Becker</i> , 132 Wn.2d 54, 93 P.2d 1321 (1997).....	5, 76, 7, 8
<i>State v. Bogner</i> , 62 Wn.2d 247, 382 P.2d 254 (1963).....	5, 6
<i>State v. Godsey</i> , 131 Wn.App. 278, 127 P.3d 11 (2006).....	11
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	10
<i>State v. Homan</i> , 181 Wn.2d 102, 330 P.3d 182 (2014).....	10
<i>State v. Jacobsen</i> , 78 Wn.2d 491, 477, P.2d 1 (1970).....	7
<i>State v. Lampshire</i> , 74 Wn.2d 888, 447 P.2d 727 (1968).....	5, 6
<i>State v. Levy</i> , 156 Wn.2d 709, 132 P.3d 1076 (2006).....	5-9

### FEDERAL CASES

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	10
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	10

## TABLE OF AUTHORITIES

### Page

#### FEDERAL CASES

*In re Winship*, 397 U.S. 358, 90 S.  
Ct. 1068, 25 L. Ed. 2d 368 (1970).....10

*United States v. Gaudin*,  
515 U.S. 506, 115 S. Ct. 2310, 132 L.Ed. 2d 444 (1995).....10

#### STATUTES, RULES AND OTHERS

WPIC 120.04.....11

RAP 2.5(a).....6

RCW 9A.76.175.....9, 10, 12

A. ASSIGNMENTS OF ERROR

1. The state did not prove that the defendant made a material miss-statement to a public officer.

2. The defendant was denied his right to an impartial jury trial by the trial court's written opinions on the court's instructions to the jury.

Issues Presented on Appeal

1. Where the interviewing officer never believed defendant's mis-statements, could those ignored statements be considered "material" in the charge of making a false statement to a public officer?

2. Was the defendant denied his right to a fair trial by the trial court writing "guilty" on the reckless burning jury instruction and by circling "maliciously" on the arson in the second degree instruction?

B. STATEMENT OF THE CASE

Michael Scheef was charged with arson in the second degree, reckless burning in the first degree and making a false statement to a police officer. CP 60-61. He was convicted of reckless burning and making a false statement. CP 50-52.

a. Reckless Burning

Three days after the fires, retired officer Smith briefly spoke with

Scheef at the location of the fires - Scheef's residence and a motor home on the property. Scheef's father owned the house but not the motor home. Smith did not testify, but Jason Wecker, another officer took over questioning Scheef and testified at trial that Scheef initially said that he did not set the fires but had been abducted by three men. RP 62-65, 71.

Wecker told Scheef he did not believe him and Scheef immediately told Wecker that he in fact accidentally set the house fire and in a panic he threw a lit gas can into the motor home. RP 65, 90. At no time did Wecker ever believe Scheef's story. RP 64-65. Scheef explained during trial that he was afraid his father would be angry and blame him for the fire. RP 99-100, 109-110, 117, 119. Wecker arrested Scheef based on Scheef's statements and never bothered to analyze the accelerant used to ignite the fires. RP 75, 77.

b. Judicial Comments on Jury Instructions.

Without objection, the trial court submitted the following instructions to the jury. CP 39-49.

**INSTRUCTION No. 7.**

To convict Mr. Michael Scheef of the crime of Arson In The Second Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 30, 2013, Michael Scheef caused a fire or explosion;
- (2) That the fire or explosion damaged a Tioga motorhome;
- (3) That Michael Scheef acted knowingly and maliciously; and
- (4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable

**COURT'S INSTRUCTIONS**

**5**



**No. 8.**

To convict Mr. Michael Scheef of the crime of Reckless Burning in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- Guilty*
- (1) That on or about September 30, 2013, Michael Scheef caused a fire or an explosion;
  - (2) That the fire or an explosion damaged a Tioga motorhome;
  - (3) That Michael Scheef knowingly caused the fire or explosion;
  - (4) That Michael Scheef recklessly caused the damage; and
  - (5) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 39-49.

This timely appeal follows. CP 77-78.

1. TRIAL COURT'S HAND WRITTEN NOTES ON JURY INSTRUCTIONS CONSTITUTED PREJUDICIAL COMMENTS ON THE EVIDENCE WHICH DENIED SCHEEF HIS RIGHT TO AN IMPARTIAL JURY TRIAL.

- a. Judicial Comment on Evidence May Be Raised for the First Time on Appeal.

When the defendant fails to object at trial, error may be raised for

the first time on appeal if the error “invades a fundamental right of the accused.” *State v. Levy*, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006) (quoting, *State v. Becker*, 132 Wn.2d 54, 64, 93 P.2d 1321 (1997)) (a reviewing court will “consider a claimed error in an instruction if giving such instruction invades a fundamental right of the accused.”); *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968) (because a comment on the evidence invades a constitutional provision, failure to object does not foreclose raising the issue on appeal); *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d 254 (1963) (even if the evidence is undisputed or overwhelming, comment by the judge violates a constitutional injunction).

In *Levy*, the trial court informed the jury in the first degree burglary to convict instruction that the victim’s apartment was a “building”, and in the first degree robbery charge, instructed that a crowbar was a “deadly weapon”. *Levy*, 159 Wn.2d at 717, 719-722. The Supreme Court held that these instructions were impermissible comments on the evidence. *Levy*, 159 Wn.2d at 722.

*Levy* did not object to the judicial comments on the evidence during trial, but the Supreme Court determined that review was necessary because the claimed errors in the jury instructions were manifest constitutional errors, and the errors were explicitly prohibited by the

Washington Constitution.

Here too the trial court's written notes: "guilty" on the jury instruction #7 reckless burning; and circling "maliciously" on instruction #8, the arson in the second degree instruction, while not necessarily discoverable at trial, constituted judicial comments on the evidence, significantly more egregious than the comments in *Levy*, deemed manifest constitutional errors because the trial judge here declared his opinion that Scheef was guilty, a decision which invaded the province of the jury. *Lampshire*, 74 Wn.2d at 893; *Bogner*, 62 Wn.2d at 252.

Without determining if counsel was aware of the error and in a position to object, the error here was explicitly prohibited by the Washington Constitution. Accordingly, this court should consider this issue under *Levy*, 156 Wn.2d at 720 and RAP 2.5(a).

b. Judicial Comments Must Be Analyzed as Per Se Prejudicial.

This Court reviews jury instructions de novo, within the context of the jury instructions as a whole. *Levy*, 156 Wn.2d at 721. A judge is prohibited by article IV, section 16 from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been established as a matter of law." *Levy*, 156 Wn.2d at 721 (*quoting, Becker*, 132 Wn.2d at 64). Prejudice is presumed

when a judge makes a comment on the evidence in a jury instruction “ and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d at 725.

Even a judicial comment which merely implies the court’s personal feelings on an element, rather than expressly stating that opinion, is nonetheless sufficient to be an impermissible comment on the evidence). *Levy*, 156 Wn.2d at 721; *State v. Jacobsen*, 78 Wn.2d 491, 495, 477, P.2d 1 (1970). Accordingly, any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment. *Levy*, 156 Wn.2d at 721.

For example, in *Levy*, the Supreme Court agreed with the Court of Appeals that the judge’s references to the victim’s apartment as a building and to the revolver and crowbar as deadly weapons were judicial comments. *Levy*, 159 Wn.2d at 721. In *Becker*, the “to-wit” language in the special verdict form expressly stated that the youth program *was a school*, a fact that was highly contested by the parties and critical to the case. *Becker*, 132 Wn.2d at 64. The question of whether it was a school was also a threshold issue that had to be established for there to be *any crime at all*. *Id.* Here “to: wit” language circling “maliciously” and the

writing “guilty”, were prohibited judicial comments.

c. Scheef Was Prejudiced By Judicial Comments.

When analyzing judicial comments, the question “is whether the mere mention of a fact in an instruction conveys the idea that the fact has been accepted by the court as true.” *Levy*, 156 Wn.2d at 726. In *Levy*, the Supreme Court determined that the judge did comment on the evidence but that the comments were not prejudicial because the defense did not contest that the apartment was a building or that the crow bar was a weapon or the jewelry personal property. *Levy*, 156 Wn.2d at 727.

The Court in *Becker*, however determined the judicial comments were prejudicial because the issue of whether YEP was a school was highly contested and provided the basis for the entire case. Here too, the errors were prejudicial because the word “guilty” on the instructions was tantamount to a directed verdict and the circling the term “maliciously” highlighted an element of the charge that was highly contested and at the heart of the state’s arson case. Scheef argued throughout trial that both of the fires were accidental and involved panic in the motor home. These comment like the determination of whether YEP was a school were not only at the heart of the case, but impermissibly conveyed the idea that court accepted as true that Scheef was guilty and perhaps that he acted

maliciously.

Even though Scheef was not convicted of arson in the second degree, it is impossible to determine the impact of the court's comments in a vacuum. Perhaps the jury would have acquitted on the fire charges had the judge not communicated "guilt" and emphasized "maliciously". The judicial comments were presumptively prejudicial in this case and the state cannot affirmatively show that no prejudice could have resulted. *State v. Levy*, 156 Wn.2d at 725. For these reasons, Mr. Scheef requests this Court reverse his conviction and remand for a new trial on the reckless burning charge.

2. THE STATE FAILED TO PROVE  
BEYOND A REASONABLE DOUBT THE  
ELEMENT: "MATERIAL" IN THE  
CHARGE OF MAKING FALSE  
STATEMENTS TO A PUBLIC  
SERVANT.

The state failed to prove that Scheef made a material false statement to the arresting officer, an essential element of the charge of making a false statement to a public servant under RCW 9A.76.175.

a. Overview Burden of Proof.

The Fourteenth Amendment provides a criminal defendant may only be convicted if the government proves every element of the crime

beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300- 01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *United States v. Gaudin*, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L.Ed. 2d 444 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process “indisputably entitles[s] a criminal defendant to ‘a . . . determination that he is guilty of every element of the crime beyond a reasonable doubt.’” *Apprendi*, 530 U.S. at 476-77 (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)).

Evidence is sufficient if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). A claim of insufficient evidence admits the truth of the evidence and all reasonable inferences that can be drawn from that evidence. *Homan*, 181 Wn.2d at 106.

b. RCW 9A.76.175 Making False Statement to Public Servant.

RCW 9A.76.175 making a false or misleading statement to a public servant provides:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

This statute contains the following elements: (1) knowingly, (2) making a false or misleading; (3) material statement; (4) to a public servant. *Id.*

Scheef challenges the "material" element. A statement is only material if the public servant is reasonably likely to rely on the statement in the discharge of his or her official powers or duties. *Id.*; See Also WPIC 120.04. The state does not have to prove that the officer actually relied on the statements. *State v. Godsey*, 131 Wn.App. 278, 291, 127 P.3d 11 (2006).

c. The False Statement Was Not Material.

The basis of the making a false statement charge against Scheef consisted of Scheef initially telling Smith that he did not know how the fire started and was not on the property at the time because he had been kidnapped by three unknown males..... RP 62. Wecker who was listening testified that he interrupted Scheef and told him that he did not believe Wecker's story and just wanted to determine if the fire was set accidentally or intentionally. RP 64.

When Wecker confronted Scheef, Scheef quickly admitted that he



had in fact accidentally started the house fire. RP 65. Wecker did not conduct any investigation of the fire because he believed Scheef when he immediately stated he accidentally started the house fire when filling gasoline lanterns and stated that in a panic he threw a lit can of gasoline into the motor home. RP 64-65.

Wecker never believed Scheef's abduction story because before speaking with Scheef, Wecker had spoken to two witnesses who saw Scheef the day of the fire. RP 63. Wecker never testified that he relied on Scheef's abduction story, and in fact, Wecker chose not to investigate the fire for accelerants because he believed Scheef's modified version. RP 74-75. Deputy Smith did not testify and there were no findings entered or evidence presented that Smith ever relied on or believed Scheef's story.

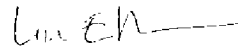
Scheef's statements to Wecker were not "material" because Wecker knew that Scheef was on scene during the fire and later at a friend's house, and Wecker never relied on Scheef's story and was never reasonably likely to rely on Scheef's story. RCW 9A.76.175. Wecker simply told Scheef that he was not telling the truth and Scheef then reported the truth. These facts, taken in the light most favorable to the state do not establish beyond a reasonable doubt that Scheef made a material mis-statement to a public servant. Accordingly, the false statement conviction must be reversed and dismissed with prejudice.

D. CONCLUSION.

Michael Scheef respectfully requests this court reverse and dismiss with prejudice the charge of making a false statement to a public servant and reverse the first degree reckless burning and remand for a new trial.

DATED this 13th day of April 2015

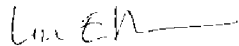
Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor's Office [jwalker@co.grays-harbor.wa.us](mailto:jwalker@co.grays-harbor.wa.us) a true copy of the document to which this certificate is affixed, on 13, 2015. Service was made by electronically to the prosecutor and Michael Scheef, P.O. Box 630 Montesano, WA 98563 by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**ELLNER LAW OFFICE**

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